Supreme Court, U. S.
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79-1302

In the Supreme Court of the United States

October Term, 1979

No. 79-.....

DAVID S. KENNEDY, Trustee in bankruptcy of the estates of JIMMY ODELL CLIMER and SUZETTE CLIMER, aka MRS. JIMMY CLIMER, Bankrupts,
Petitioner,

vs.

HANCOCK INVESTMENT COMPANY, INC. and HARDEMAN COUNTY SAVINGS BANK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

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DAVID S. KENNEDY, Trustee in bankruptcy of the estates of JIMMY ODELL CLIMER and SUZETTE CLIMER, aka MRS. JIMMY CLIMER, Bankrupts,
Petitioner,

vs.

HANCOCK INVESTMENT COMPANY, INC. and HARDEMAN COUNTY SAVINGS BANK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the "Order" of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") entered in this case on December 17, 1979, and the mandate issued on February 5, 1980, by the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit Order affirmed the District Court for the Western District of Tennessee, Western Division at Memphis. None of these opinions has as yet been reported. Said opinions are attached as Appendix "A" and "B" respectively.

JURISDICTION

The jurisdiction of this Court is established by 28 U.S.C. Section 1254. The decision sought to be reviewed is the Order of the Sixth Circuit dated December 17, 1979, affirming the District Court, which had theretofore reversed the Bankruptcy Court. The Bankruptcy Judge's opinion is attached as Appendix "C".

QUESTION PRESENTED

The ultimate question presented is:

Do the Tennessee recording statutes and Section 70c of the Bankruptcy Act, 11 U.S.C. Section 110(c), invalidate an unrecorded conditional sale of real property as against the purchasers' bankruptcy trustee, for distribution purposes in bankruptcy?

STATEMENT OF RELEVANT FACTS AND JUDICIAL HISTORY OF THE CASE

The relevant and controlling facts and judicial history are not in substantial dispute and may be briefly summarized as follows:

On August 13, 1975, Respondent, Hancock Investment Company, Inc. ("Hancock"), *sold* for $9,575.00 a certain unimproved lot located in Fayette County, Tennessee, to

Jimmy Odell Climer and wife, Suzette Climer, also known as Mrs. Jimmy Climer ("Climers" or "Bankrupts"). In lieu of a trust deed, Hancock, as a conditional seller, accepted an unsecured amortized note and retained legal title under the buy-sell agreement to secure the unpaid purchase price. (The agreement in question is commonly referred to as an "installment land sale contract" or "conditional purchase contract," a copy of which is attached as Appendix "D".)

The sale agreement between Hancock and the Climers provided, in part, as follows:

(a) Hancock was referred to as seller.

(b) Climers were referred to as purchasers.

(c) Hancock agreed to sell.

(d) Climers agreed to buy.

(e) Climers made a cash down payment in the amount of $575.00; the unpaid purchase price balance was $9,000.00; the finance charge or time price differential was $5,272.80; the annual percentage interest rate was 10%; and the Climers were to pay principal and interest in 120 consecutive monthly installments of $118.94 each until the purchase price was paid in full.

(f) Climers had to pay all taxes and insurance.

(g) Hancock would issue a warranty deed to the Climers upon the purchase price being paid in full. Upon default, the Climers forfeited all monies paid and improvements made.

Hancock never recorded the instrument in question with the Register of Deeds of Fayette County, Tennessee.

In December of 1975, the Climers borrowed money from the Respondent, Hardeman County Savings Bank

("Bank"), to build a house on the lot. The Climers then built a home; took possession and held themselves out to the world as being the apparent or ostensible owners of the property. Bank perfected its security interest in the real property by properly recording a deed of trust to secure the construction loan. Hancock pledged the Climers' original amortized note to the Bank.

The Bank's security interest is not in question regarding the construction loan funds; however, the Bank did fail to perfect its security interest in the Climers' amortized note pledged by Hancock.

In February of 1977, the Climers experienced financial distress and filed voluntary bankruptcy petitions under Chapters I-VII of the Bankruptcy Act. Petitioner was subsequently appointed bankruptcy trustee of the estates of the Climers. By consent and Court approval, the house and lot were sold by the Climers' bankruptcy trustee for $49,100.00. The Bank, which held a valid mortgage on the real property, was fully paid from the proceeds realized from the sale regarding the construction loan. However, Hancock asserted that it was entitled to the full balance owed by the Climers (i.e., $8,600.87) and filed a "secured" proof of claim form with the Bankruptcy Court Clerk for the unpaid purchase price.

Petitioner herein, as bankruptcy trustee of the Climers, argued, under a totality of the circumstances, that for distribution purposes in bankruptcy, Hancock (or the Bank) held only an unsecured note (i.e., the underlying obligation) because it failed to register the instrument in question under applicable state law and should, therefore, receive only a pro-rata distribution along with the other unsecured creditors and the Bank failed to perfect a security in the note. Petitioner further contended that under Section 70c of the Bankruptcy Act, 11 U.S.C. Section 110(c), he, as bankruptcy trustee of the purchasers of the house and lot, was clothed with the status of a hypothetical, ideal, imaginary, perfect creditor, holding an equitable or legal lien, irreproachable and *without notice,* regardless of whether such a creditor exists; and since the instrument in question was not recorded under applicable state law, Hancock (or the Bank) held a mere unsecured claim against these estates although the agreement in question was binding upon the Climers, but not their bankruptcy trustee.

DECISIONS BELOW

The Bankruptcy Judge essentially held that for bankruptcy distribution purposes the location of "title" was not conclusive and controlling in determining the rights of creditors; that creditors' rights are determined solely by the nature and priority of the agreements and applicable state law; that the transaction in question should be viewed as a sale where the seller charges more, by means of a "time-price differential", because of the installment payment; and that under Tennessee law the instrument in question had to be publicly registered by Hancock to avoid a successful attack by the purchasers' bankruptcy trustee; therefore, Hancock (or the Bank) was an unsecured creditor for distribution purposes in bankruptcy under Section 70c of the Bankruptcy Act, 11 U.S.C. Section 110(c).

Hancock appealed to the District Court, which reversed the Bankruptcy Judge's holding, inter alia, that since Hancock retained legal "title," subject to divestment upon full payment of the contract price, the Climers' bankruptcy trustee could not prevail. The Sixth Circuit affirmed the District Court.

Petitioner herein states that both the District Court and the Sixth Circuit totally ignored the recording acts of Tennessee and relied solely upon the old "title" dichotomy.

REASONS FOR GRANTING CERTIORARI

This is apparently a case of first impression under the Tennessee recording acts and Section 70c of the Bankruptcy Act, 11 U.S.C. Section 110(c).

There is a strong policy in favor of recordation of any document involving rights in land, insofar as third persons are concerned. The policy of the law is against upholding secret charges to the injury of others; moreover, secret charges are abhorred by the courts.

Equality of distribution is a fundamental principle under the law of Congress relating to bankruptcy.

A contractual seller of real property in the State of Tennessee should not be permitted to rely solely upon the language of the instrument and, ipso facto, immunize himself from the required recording acts.

Tennessee Code Annotated Section 64-2401 provides, in pertinent part, as follows:

> "*64-2401. Writing eligible for registration.*—The following writings may be registered:
>
> "(1) All agreements and bonds for the conveyance of real or personal property.
>
> . . .
>
> "(14) All instruments in writing transferring or conveying any right of improvement, occupancy, or preemption."

Clearly, the agreement in question was eligible for registration under Tennessee Code Annotated Section 64-2401, supra.

Tennessee Code Annotated Section 64-2601, provides as follows:

> "*64-2601. Effect of instruments with or without registration.*—All of the instruments mentioned in Section 64-2401 shall have effect between the parties to the same, and their heirs and representatives, without registration; *but as to other persons, not having actual notice of them, only from noting thereof for registration on the books of the register,* unless otherwise expressly provided." (Emphasis added.)

A bankruptcy trustee under Section 70c of the Bankruptcy Act, 11 U.S.C. Section 110(c), is deemed not to have knowledge of prior charges or encumbrances. See 4B *Collier on Bankruptcy*, Paragraph 70.53 at 636-637.

Tennessee Code Annotated Section 64-2602 provides as follows:

> "*64-2602. Notice to all the world.*—All of said instruments so registered shall be notice to all the world from the time they are noted for registration, as prescribed in Section 8-1308; and shall take effect from said time."

Hancock successfully (but erroneously) argued in the District Court that the "unless otherwise expressly provided" language in Tennessee Code Annotated Section 64-2601, supra, triggered the applicability of Tennessee Code Annotated Section 64-2603, which, ipso facto, allegedly exempts and immunizes Hancock from having to register the document in question. Section 64-2603 provides as follows:

> *"64-2603. Unregistered instruments void as to creditors and bona fide purchasers.*—Any of said instruments not so proved, or acknowledged and registered, or noted for registration shall be null and void as to existing or subsequent creditors of, or bona fide purchasers from, the makers without notice."

Petitioner herein respectfully states that, simply speaking, Hancock is not a "beneficiary" of Tennessee Code Annotated Section 64-2603, supra, and it cannot, therefore, rely upon this statute. It is only creditors of, or bona fide purchasers from, the maker of an unrecorded deed who are the beneficiaries of this statute—not the seller.

Accordingly, petitioner states that the District Court and the Sixth Circuit have erroneously interpreted or completely ignored applicable Tennessee recording acts and permitted Hancock to receive treatment in bankruptcy which is tantamount to, inter alia, of being preferential in nature; and further they have permitted a state created priority—both of which defeat a fundamental principle under the Bankruptcy Act, namely equality of distribution.

Petitioner further states that the District Court and the Sixth Circuit were apparently confused by the "title" dichotomy—i.e., the District and the Sixth Circuit Courts stated that because Hancock remained the record owner and held legal title, the rights of the bankruptcy trustee were subordinate to the rights of Hancock (although Hancock (or the Bank) only held an unsecured amortized note).

Petitioner reiterates that for bankruptcy distribution purposes the location or situs of "title" to property is not conclusive and controlling. E.g., a vendor, desiring to transfer personal property to a vendee, may retain title under a "title retention contract," "retain-title contract,"

etc. to secure the unpaid purchase price; however, under the Uniform Commercial Code, the retained "title" to be perfected, the transaction must be publicly recorded, if the vendee is in possession. See Tennessee Code Annotated Section 47-9-301. The foregoing personal property example is analogous to the instant case—i.e., applicable state laws require a recordation.

Further, the instant case is analogous to a personal property lease with an option to purchase. Under this type of arrangement, the lessor retains title and the item is rented for a specified term, usually a long term; the lessee agrees to pay a stipulated rental charge, usually monthly; but he has the option to purchase the item at the end of the term for no additional consideration or a fixed price, usually nominal; and all rent payments paid under the contract are credited toward the purchase price. Such an arrangement may be considered a true lease, but it may also be considered a sale with an attempt to reserve a security interest until the purchase price is paid. The answer to this question depends on applicable state law. The Courts are apt to construe such an arrangement to be a conditional sale rather than a pure lease. The mere use of the word "rental" (or "title" retention) in the instrument is not controlling. The Uniform Commercial Code expressly covers this problem and provides that the right of the parties to chattel security transactions shall be governed by Article 9 of the Code, regardless of the form of the agreement and regardless where the "title" is placed. See Tennessee Code Annotated Sections 47-1-201(37) and 47-9-102(2). Accordingly, such a lease with an option to purchase is a chattel security transaction, and valid only if it is duly perfected according to the rules governing security transactions in general.

Petitioner states that in the instant case Hancock could have eliminated and obviated the problem by merely recording the instrument in question. Hancock elected not to do so and it should now suffer the consequences of the results of the bankruptcy petitions and attack by the purchasers' bankruptcy trustee, however harsh the results may be.

Based on all the foregoing, petitioner requests that the Sixth Circuit and District Court be reversed and the Bankruptcy Judge's opinion be reinstated.

CONCLUSION

I respectfully request the Court, for all the reasons set forth above, to grant certiorari, reverse the decision below, uphold the doctrine of equality of distribution which is fundamental in bankruptcy, and relegate Hancock to the status of an unsecured creditor for purposes of bankruptcy distribution.

Respectfully submitted,

DAVID S. KENNEDY, Petitioner
420 Commerce Title Building
Memphis, Tennessee 38103
(901) 526-6535

APPENDIX

APPENDIX A

77-1681

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JIMMY ODELL CLIMER and SUZETTE CLIMER, dba MRS. JIMMY CLIMER, Bankrupts; DAVID S. KENNEDY, Trustee,
Plaintiff-Appellant,

vs.

HARDEMAN COUNTY SAVINGS BANK, ET AL., Defendants, HANCOCK INVESTMENT CO., INC.,
Defendant-Appellee.

ORDER

(Filed December 17, 1979)

BEFORE: ENGEL, KEITH and JONES, Circuit Judges

This case concerns a bankruptcy appeal. The trustee moved to have a secured creditor's preference set aside. The Bankruptcy Judge granted the Trustee's petition. The district court reversed. We affirm the district court.

In August of 1975 the Hancock Investment Co. sold a piece of land to Jimmy and Suzette Climer for $9,575.00. Instead of taking back the mortgage, the investment company had the couple sign an installment land sale contract.

In December of 1975, the Climers borrowed money from a bank to build a house on the property. The bank worked out a deal with the couple and the investment company whereby the bank held a protected security in-

terest in the property. The bank's secured status is not in question.

In February of 1977, the Climers declared bankruptcy and a trustee was duly appointed. The trustee sold the land and attached house for $49,100.00. The bank, which had a valid mortgage on the property, was fully paid. However, the investment company claimed that it was entitled to $8,600.67 which was owed it under the installment land contract. The trustee, on behalf of the general creditors disagreed. The trustee claimed the investment company was not entitled to preferred status.

The trustee argues that he has the rights of a theoretical judgment lien creditor under §70(c) of the Bankruptcy Act. Applying these rights, he claims that he could set aside the investment company's preferred status because the company did not record the installment sales contract. The trustee argues strongly that the law disfavors secret liens and that a judgment creditor's interest is always superior to that of a holder of an unfiled security interest.

We do not disagree with the trustee's general statements of the law. The flaw in the trustee's argument is that the investment company did not have a lien on the property. It had legal title. It was only when the Climers finished paying off the installment sales contract that they would receive legal title to the property.

As Judge Wellford explained in his opinion below, under Tennessee law, a judgment lien creditor of the Climers could not attach the property. The creditor would have to bring a suit in equity to seize whatever equity the Climers might have built up in the property. This makes perfect sense since the record owner of the property was the investment company. The trustee has confused this with a situation involving a mortgage, where legal title is in

the name of the buyer, subject to a security interest. In this case, legal title was in the name of the investment company, subject to divestment upon full payment of the contract price. The rights of the trustee were subordinate to the rights of the investment company.

The judgment of the district court is affirmed on the basis of the above as more fully amplified in Julge Wellford's opinion.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NO. 77-2500

IN RE

JIMMY ODELL CLIMER and SUZETTE CLIMER,
a/k/a MRS. JIMMY CLIMER,
Bankrupts.

HARDEMAN COUNTY SAVINGS BANK, et al.,
Appellants,

vs.

DAVID S. KENNEDY, Trustee in Bankruptcy for the
Estates of the above-named Bankrupts,
Appellee.

ORDER

(Filed September 22, 1977)

This is an appeal from a judgment of the Bankruptcy Court. Oral argument on the appeal was requested and was heard on September 16, 1977, and the Court has also considered the respective memoranda and briefs.

The findings of facts by the Bankruptcy Judge are not disputed on appeal. On August 13, 1975, appellant, Hancock Investment Co., Inc. ("Hancock"), entered into an agreement with the bankrupts, Jimmy O. Climer and Suzette J. Climer, wherein the bankrupts were to purchase unimproved real property from Hancock for the price of $9,575.00. The cash down payment was $575.00; the unpaid balance of purchase price was $9,000.00; and the finance charge was $5,272.80; and the total deferred pay-

ment price was $14,847.80. This agreement is commonly known as an "Installment Land Sale Contract." Hancock agreed, upon receipt in full of the total deferred payment price from the bankrupts, to convey said real property to the bankrupts by a general warranty deed.

The bankrupts also executed a "Monthly Installment Amortized Note With Prepayment Privilege" in favor of Hancock wherein the bankrupts agreed to pay Hancock the principal sum of $9,000.00, together with interest thereon at the rate of 10% per annum from September 1, 1975, until maturity. The principal and interest were to be payable in installments of $118.94 beginning on October 1, 1975, and a like amount on the first day of each and every month thereafter until paid in full. No mortgage or deed of trust was executed to secure the note; and the bankrupts never recorded the installment land sale contract.

On December 3, 1975, the bankrupts executed a note and deed of trust in favor of Hardeman County Savings Bank of Bolivard, Tennessee ("Bank"). Said trust deed was recorded and the bankrupts then caused to be constructed on the real property in question a 3 bedroom, 2-1/2 bath and den home, and there is no question but that said Bank is entitled to be treated as a security creditor.

On February 4, 1977, the bankrupts filed voluntary petitions and thereafter a trustee was appointed to their estates. The trustee sold the land in question, with Court permission, for $49,100.00. The issue before the Bankruptcy Judge was the validity of Hancock's claim to $8,666.57 of the proceeds in satisfaction of the unpaid balance on the note executed with the land sale contract. The Bankruptcy Judge ordered Hancock to return to the trustee the $8,666.57 it had provisionally received holding that Han-

cock was not entitled to security creditor status. Hancock's claim based on the note was required to be filed as a general unsecured creditor claim.

The issue before this Court on appeal is whether the Bankruptcy Judge applied erroneous principles of law and equity to the essentially agreed facts. The Bankruptcy Judge reasoned that the installment land sale contract was in actuality a security device and that appellant, Hancock, occupied a mortgagee status thereunder, citing old Tennessee decisions, *Tharpe v. Dunlap,* 51 Tenn. 674 (1871); *Hines v. Perkins,* 49 Tenn. 395 (1871); and *Anthony v. Smith,* 28 Tenn. 508 (1848). The Bankruptcy Judge further pointed to the explicit language to the contract manifesting the parties' intention that the contract operate as a security agreement.[1]

The Bankruptcy Judge also reasoned that due to the operation of TCA §§ 64-2401 and 64-2601 the installment land sale contract was ineffective as a security agreement against the appellee trustee in bankruptcy TCA § 64-2601 states that an instrument capable of being registered under TCA § 64-2401 (including both agreements to convey real property and all mortgages and trust deeds) is always effective as between the immediate parties. If unrecorded, however, the instrument has no effect as to persons without actual notice of it. Since § 70(c) of the Bankruptcy Act [11 USC § 110(c)] gives the trustee the status of a hypothetical judicial lien creditor without notice upon filing of the petition, TCA § 63-2601[2] was deemed to protect

1. "This transaction is secured by Seller's retention of title to the lot . . ."

2. 64-2601. *"Effect of instruments with or without registration*—All of the instruments mentioned in § 64-2401 shall have effect between the parties to the same, and their heirs and representatives, without registration; but as to other persons, not having actual notice of them, only from the noting thereof for registration on the books of the register, unless otherwise expressly provided.

the trustee against the assertion of an unrecorded security device, and thus the trustee would prevail over Hancock's claim as a secured creditor.

The claimant, Hancock, on the other hand relies upon TCA § 64-2603[3] in that it refers to the effect of failure of registration of such an instrument "as to creditors of, or bona fide purchasers from the *makers* without notice" (emphasis added) in conjunction with the clause in TCA § 64-2601 "unless otherwise expressly provided." Hancock argues that since the trustee is not in a position as a creditor or bona fide purchaser of the maker of a conveyance of title under Tennessee law, he cannot prevail; further, that the trustee cannot assume a position of greater standing than the bankrupt who is bound by the contract between the parties. Appellant's position is indeed sustained by Tennessee Courts. *Wright v. Black,* 159 Tenn. 254 (1929); *Bryant v. Bank of Charleston,* 107 Tenn. 560, 564 (1901); *Leech v. Hillsman,* 76 Tenn. 747, 750, 751 (1882); and *Harris v. Williford,* 179 Tenn. 299 (1942); 79 S.W.2d 582.

The rationale behind the distinction, in treatment of bona fide purchasers from the maker and the grantee is that the burden is cast upon the latter to effect a recordation to protect his rights and those standing in his position subsequently. Also, in this type of case involving an unrecorded purchase installment contract, anyone seeking information as to title may check to discover the record titleholder; such interested person is put on notice as to the legal titleholder's interest—Hancock—in this instance. No bona fide purchaser from or creditor of the Climers should have been surprised to know that Hancock—of record—maintained an interest in the property.

3. 64-2603. *"Unregistered instruments void as to creditors and bona fide purchasers.*—Any of said instruments not so proved, or acknowledged and registered, or noted for registration, shall be null and void as to existing or subsequent creditors of, or bona fide purchasers from, the makers without notice."

To assert or protect the buyer's interest, suit could be brought to realize as a matter of equity the buyer's rights, if any, in the property. The forfeiture clause in the contract would necessarily have to withstand judicial scrutiny before it could be enforced by the vendor, which here does not attempt to eliminate any equity the Climers may have or have had at the time of bankruptcy. Therefore, even if Hancock, the vendor or maker, stands in a position as mortgagee, it retained legal title, not merely an equitable title, and may enjoy the benefits of Tennessee law as to its legal status in the absence of registration of the installment contract. See *Ferguson v. Blood,* 152 F. 98 (9th Cir., 1907); *Graham v. McCampbell,* 19 Tenn. 52 (1838); and *Hines v. Perkins, supra.*

There is no federal law upon which the trustee may rely to override the effect of Tennessee law on this Tennessee transaction involving real property in this State. The trustee argues that this form of "security device" should be suspect and that some commentators and courts have been disposed to construe them most strongly against the seller. See *Hoffman v. Semet,* 316 S.2d 649 (Fla. App. 1975), for example, but even so, the courts have generally indicated that the rights of the vendee, his equity, may be sought out or reached by his creditors prior to default by the vendee. In a bankruptcy situation of the vendee, that court of equity will seek to preserve the vendee's interests for the benefit of creditors as in the case of personal property subject to a title retention contract, even after default.

The Court is persuaded, then, that the decision of the Honorable Referee in Bankruptcy is erroneous and that Hancock is entitled to a secured status in the property in question. It is for the legislature to amend the property

laws of Tennessee, not the Courts, if the result as to the vendees and their creditors in this type of security situation is unsatisfactory. The effect of this decision, however, is not to disturb the conclusion that the Climers are entitled to a homestead exemption.

Let judgment be submitted accordingly.

This 22d day of September, 1977.

/s/ Harry W. Wellford
Harry W. Wellford, Judge
United States District Court

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Nos. BK-77-20262
BK-77-20263

IN RE:
JIMMY ODELL CLIMER, and SUZETTE CLIMER,
aka MRS. JIMMY CLIMER,
Bankrupts,

DAVID S. KENNEDY, Trustee In Bankruptcy for the
estate of the above-named bankrupts,
Plaintiff,

vs.

HARDEMAN COUNTY SAVINGS BANK Formerly Known As THE HAMILTON BANK OF HARDEMAN COUNTY; HANCOCK INVESTMENT COMPANY, INC.; JIMMY ODELL CLIMER; SUZETTE CLIMER, aka MRS. JIMMY CLIMER; and
JOY JEMISON THIERMAN*.
Defendants.

MEMORANDUM OPINION

(Filed July 28, 1977)

Appearances:

Hon. David S. Kennedy, Esq.,
Attorney for Plaintiff,

*Defendant, Joy Jemison Thierman, has heretofore renounced any interest in the real property in question.

Hons. Shields & Levit, Esqs.
Attorneys for Defendant
Hancock Investment Company, Inc.,

Hon. William Gotten, Esq.,
Attorney for Bankrupts

I

The issue to be determined is the question of the validity and priority of an installment land sale contract.

II

The facts are not in dispute. On August 13, 1975, Hancock Investment Company, Inc. ("Hancock") and Jimmy O. Climer and wife, Suzette J. Climer ("Bankrupts") entered into a written agreement (wherein the former was referred to as seller and the latter were referred to as purchasers), wherein the bankrupts were to purchase from Hancock certain unimproved real property located in Fayette County, Tennessee for a total cash price of $9,575.00; the cash down payment was $575.00; the unpaid balance of purchase price was $9,000.00; the finance charge was $5,272.80; and the total deferred payment price was $14,847.80. This agreement is commonly known as an "Installment Land Sale Contract". Hancock agreed, upon receipt in full of the total deferred payment price from the bankrupts, to convey said real property to the bankrupts by a general warranty deed. Said agreement is attached hereto, incorporated herein by reference, and marked Exhibit "A" hereto.

Also, on August 13, 1975, the bankrupts executed a "Monthly Installment Amortized Note With Prepayment Privilege" in favor of Hancock wherein the bankrupts agreed to pay Hancock the principal sum of $9,000.00 to-

gether with interest thereon at the rate of 10% per annum from September 1, 1975 until maturity. The principal and intrest were to be payable in installments of $118.94 beginning on October 1, 1975, and a like amount on the first day of each and every month thereafter until paid in full. Said note is attached hereto, incorporated herein by reference and marked Exhibit "B". No deed of trust was executed to secure the note; and the bankrupts never recorded the installment land sale contract.

On December 3, 1975, the bankrupts executed a note in the amount of $35,000.00 together with interest thereon at the rate of nine per centum per annum in favor of Hardeman County Savings Bank of Bolivar, Tennessee ("Bank"). Said note is attached hereto, incorporated herein by reference and marked Exhibit "C".

Also, on December 3, 1975, the bankrupts executed a deed of trust on the real estate in question to secure the aforesaid note to the Bank. Said deed of trust is attached hereto, incorporated herein by reference and marked Exhibit "D". (Said deed was recorded.)

The bankrupts then caused to be constructed on the real property in question a 3 bedroom, 2½ bath and den home.

Hancock subsequently pledged the aforesaid note to the bank as security for a loan obtained by Hancock from the Bank.

On February 4, 1977, the bankrupts filed voluntary petitions under Chapters I-VII of the Bankruptcy Act; and the first meetings of creditors were held on February 14, 1977, at which time and place David S. Kennedy was appointed Trustee of their respective estates. No foreclosure proceedings were pending at the time the bankruptcy petitions were filed.

Said real estate was subsequently sold by the bankruptcy trustee free of liens with the understanding of the parties that the asserted liens would attach to the proceeds. The sale price was $49,100.00. Said settlement sheet is attached hereto, incorporated herein by reference and marked Exhibit "E".

III

The bankruptcy Court's equitable jurisdiction is well established in Section 2(a) of the Bankruptcy Act (11 U.S.C. Section 11(a)). The equitable powers of the bankruptcy court have been exercised in passing on a wide range of questions arising out of the administration of bankrupt estates. Generally speaking, they have been invoked to the end that fraud will not prevail, that substance will not give way to form, and that technical considerations will not prevent substantial justice from being done. See *Pepper v. Litton*, 300 U.S. 295.

Congress has exercised its power to regulate property rights with the enactment of the Bankrutpcy Act, which has become a part of every contract regardless of whether or not it is expressly stated in the contract. *In re Teegarden*, 330 F. Supp. 1113 (E.D. Ky. 1971). The court has not found any case in Tennessee directly dealing with an "Installment Land Sale Contract" as such. However, cases do deal with the retention of title under a contract of sale and the interests created in the vendor and vendee. Where the vendor retains legal title and executes a covenant to convey, he holds the legal title as security for the payment of the purchase money and is placed upon the footing of a mortgagee who has taken a mortgage as security for the purchase money. *Tharpe v. Dunlap*, 51 Tenn. 674 (1871), *Hines v. Perkins*, 49 Tenn. 395 (1871), *Anthony v. Smith*, 28 Tenn. 508 (1848). There is a pre-

sumption that the vendor of land who retains title to the realty in himself, intends to retain it as absolute security until the purchase money is paid. *Schorn v. McWhirter,* 67 Tenn. 201 (1874), *Hines v. Perkins,* supra. In such a case, the security of the vendor (legal title to the realty) cannot be defeated by anything short of what would be regarded as sufficient to defeat or extinguish the security of a mortgagee. *Hines v. Perkins,* supra.

The Ninth Circuit in *Ferguson v. Blood,* 152 F. 98 (9 Cir. 1907), stated that in a transaction where title is retained by the vendor until payment is fully made, it is not very important what the security so retained is called. The court concluded that the security is "very generally regarded as possessing all the essential features of a mortgage", and the vendor for all practical purposes is regarded as standing as a mortgagee in his relationship to the vendee. The Ninth Circuit in this case cited with approval the case of *Graham v. McCampbell,* 19 Tenn. 52 (1838). In that case the Tennessee Supreme Court stated:

> "We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt, and the legal title retained to secure the payment of a debt. In both cases, Courts of Chancery consider the estate only as security for the payment of the debt, upon a discharge of which the debtor is entitled to a conveyance in one instance, and a reconveyance in the other."

Cases from other jurisdictions, although not controlling, seem to be in accord with these early Tennessee cases. The Court in *Buford v. Dahlke,* 158 Neb. 39, 62 N.W.2d 252 (1954), held the vendor retaining legal title following a contract to sell realty, holds it as security for payment of the purchase price. A similar finding

is found in *Hoffman v. Semet,* 316 So.2d 649 (Fla. App. 1975), where the court stated that the vendee under a contract for deed held the same interest as a mortgagor under a mortgage.

The Installment Sales Contract in question clearly states at the bottom of page one that "This transaction is secured by SELLER'S retention of title to the lot or lots being sold by this Agreement." The default provisions on page two indicate by alternative B that the contract secures the "entire indebtedness." The language of the Installment Land Sales Contract reinforced by the prommissory note executed simultaneously therewith and referred to in the contract, leads this court to believe that the Installment Land Sales Contract was a security device used to secure the payment of the purchase price. The relationship of the vendor and vendee under such a security device, based upon the foregoing authority, is that of a mortgagor-mortgagee, and will be treated as such.

TCA 64-2401 provides in part that all agreements for the conveyance of real estate, all deeds of absolute conveyance of any lands, and all mortgages and deeds of trust on real property may be registered. TCA 64-2601 provides that all instruments eligible for filing under TCA 64-2401 have no effect without registration as to persons without actual notice other than the parties to the instrument.

Hancock's position under its security device is the same as a mortgagee holding an unrecorded mortgage. The Trustee's position under Section 70(c) of the Bankruptcy Act is that of a supposed creditor without notice, who had, at the date of bankruptcy, completed all the requisite legal or equitable processes to perfect a lien upon all property available for the satisfaction of his claim against the bankrupt. 4A Collier's § 70.49.

Hancock's unrecorded security device therefore gives it the status of a general unsecured creditor. A claim based on the promissory note may be filed as an unsecured claim. Hancock pledged the note to the Bank as security for a loan to Hancock from the Bank. The rights between Hancock and the Bank as to which one has the right to file the claim on the note have not been argued and therefore will not be considered at this time. All parties have acknowledged that the recorded Deed of Trust executed by the bankrupts to the Bank creates a valid security interest in the property and the Bank is entitled to have its debt paid out of the proceeds of the sale.

The bankrupts have claimed a homestead exemption in the property. TCA 26-301 (Supp. 1976) provides for a homestead exemption of $1,000 in real estate in the possession of or belonging to each head of a family. The claimant of homestead must have a right to present occupancy of the land to be entitled to homestead although it is not essential that he have actual occupancy. *Hiphire v. Stapleton*, 57 Tenn. App. 339, 418 S.W.2d 457 (1966). TCA 26-303 clearly establishes that the homestead exemption applies to equitable as well as legal estates, therefore, the equitable interest of the bankrupts would be such an interest which would support the claim of a homestead interest.

IV

In view of the above, this Court is of the opinion that the Bank's loan for improvements on the realty is a valid security interest for which it has received full payment from the proceeds of the sale.

That Hancock is hereby ordered to return to the Trustee $8,666.57 which was received from the sale of the property for distribution to general creditors. Furthermore, any claim based on the promissory note must be filed as a general unsecured claim.

That $1,000.00 be allowed to the bankrupt, Jimmy Climer, as his homestead exemption.

The Trustee is directed to prepare an order in accordance with this opinion pursuant to Rule 921(a) to be entered on the Court's docket as provided in Rule 504.

The above constitutes this Court's findings of fact and conclusions of law pursuant to Rule 752, Rules of Bankruptcy Procedure.

SO ORDERED this 28th day of July, 1977.

/s/ William B. Leffler
William B. Leffler,
Bankruptcy Judge

HANCOCK INVESTMENT COMPANY, INC.

2555 POPLAR AVENUE

MEMPHIS, TENNESSEE 38112

Phones
Area Code 901
527-5421
327-8236

Date August 13, 19 75.

THIS AGREEMENT, made and entered into on the above date, by and between HANCOCK INVESTMENT COMPANY, INC., hereinafter called the "SELLER," and JIMMY O. CLIVER and wife, SUZETTE J. CLIVER of

553 Holzman, Memphis, Tennessee 38117 633-2624
Street Town County State Zip Tel. No.

Age Occupation Employer and Address

Bank reference Business reference

hereinafter called "PURCHASER(S)," and said parties, for the considerations herein expressed, do hereby agree as follows:

The SELLER agrees to sell and the PURCHASER(S) agree(s) to purchase the following-described property situated in Fayette County, State of Tennessee, to-wit:

Lot 6, BIG BELL Subdivision, Section 2A, as shown on plat of record in Plat Book 4, Page 2, in the Register's Office of Fayette County, Tennessee, containing 3.83 acres,

upon the terms and conditions as set forth herein.

The SELLER agrees, upon receipt in full of the payments shown herein, to convey to the PURCHASER(S) the above-described tract, parcel or lot by general warranty deed, expressly subject to any and all easements, exceptions, covenants and restrictions as are of record or which appear on the front and/or reverse side of this Agreement, and deemed to be part hereof; also, to all governmental and zoning rules, ordinances and regulations and/or any tax or other liens existing against said premises by reason of the acts or defaults of the PURCHASER(S) and as such shall be binding upon the heirs, devisees and/or successors of said PURCHASER(S).

FEDERAL TRUTH IN LENDING ACT DISCLOSURES
An Integral part of this Agreement

(1)	Cash price	$ 9,575.00	(4)	Finance Charge (Time price differential)	$ 5,272.80
(2)	Cash down payment	$ 575.00	(5)	Total of payments(3&4)	$14,272.80
(3)	Unpaid balance of cash price	$ 9,000.00	(6)	Deferred payment price (1&4)	$14,847.80

ANNUAL PERCENTAGE RATE 10 %

The total ~~of payments~~ (amount financed ~~and Finance Charge~~) on this transaction will be $9,000.00, as evidenced by a promissory note executed of even date herewith. The PURCHASER(S) shall pay principal and interest in 120 consecutive monthly installments of $118.94 each, beginning on the 1st day of October, 19 75, and continuing on the same day of each month thereafter until the whole amount is fully paid.

This transaction is secured by SELLER'S retention of title to the lot or lots being sold by this Agreement.

The PURCHASER(S) may prepay the principal obligation hereby created at any time without penalty, and any unearned interest shall be credited to the obligation at the time of prepayment. Late charges shall not be refunded.

In the event of default in the payment of any sum due hereunder, and if the obligation is collected through an attorney, PURCHASER(S) agrees to pay reasonable attorney's fees.

In the event of default of any payments provided for herein, at the option of the holder, without notice, notice being hereby expressly waived, (A) this Agreement may be cancelled, all interest of PURCHASER(S) in the property repossessed and all monies paid hereunder retained as liquidated damages for the breach of this Agreement, and/or for the rent for the detention of said property, or (B) the entire indebtedness secured hereby, declared due and payable. Failure to exercise any option shall not constitute a waiver of the right to exercise same in the event the default shall continue or again occur.

The PURCHASER(S) assumes and shall hereafter promptly pay and adjust when due, all taxes which shall hereafter become due and payable on the property described herein or shall reimburse the SELLER for any such tax payments that the SELLER may make for or on behalf of the PURCHASER(S) on said property, together with interest and penalty. Taxes are ESTIMATED to be $ 100.00 per year.

The PURCHASER(S) agree to pay all sums as shown hereon, to-wit: Price, plus FINANCE CHARGES, all as evidenced by one promissory note of even date herewith made by PURCHASER(S) and payable to the Seller, or order. Risk of loss or damage to said property by any means whatsoever shall be assumed by the PURCHASER(S) from the date of this Agreement.

The PURCHASER(S) agree to all existing and/or proposed provisions made by SELLER in connection with water, sewage and electricity.

The PURCHASER(S) hereby applies for membership in the N/A _____, and agrees to the conditions set forth in the By-Laws thereof and/or the restrictions imposed against said property.

In the event of prior sale of the above described property PURCHASER(S) may elect (A) to accept as performance by SELLER under this Agreement a different lot in the same subdivision or tract as may be offered by SELLER, or (B) to cancel this Agreement and receive a refund of all payments made hereunder. If PURCHASER(S) elect to cancel, SELLER will be without further liability except for the refund to PURCHASER(S) of any payments made hereunder. PURCHASER(S) agree to accept the decision of SELLER as to whether a prior sale of such property has been made.

It is understood by the parties that this Agreement contains the whole of the Agreement between the parties and no representations, verbal or otherwise, have been made or relied upon which are not contained or mentioned herein.

This Agreement may not be assigned by the PURCHASER(S) without written permission of the SELLER. The SELLER may assign the promissory note attached hereto to a bank or other holder in due course, and if assigned, the noteholder will have no liability under this Agreement.

Does PURCHASER(S) expect the property purchased hereby to be used as (his)(her)(their) principal residence? Yes X No_____

PURCHASER(S), by signing this Agreement, does further acknowledge receipt of a completed and fully executed copy of this Agreement which contains

and sets forth disclosures as required by the Federal Truth in Lending Act.

IN WITNESS WHEREOF, the parties have executed this Agreement in triplicate originals on this the day and year first above written.

SELLER: HANCOCK INVESTMENT COMPANY, INC.

By _____
President

PURCHASER(S) _____
Jimmy O. Climer

_____
Suzette J. Climer

ADDITIONAL AGREEMENTS:

1. Seller will install culvert and grade entrance road - Purchasers to provide gravel.
2. Seller will install electric power to front property line.
3. Seller will hard-surface subdivision roads.
4. Seller will cause all four corners of lot to be staked.
5. Seller guarantees that Purchasers can obtain adequate water supply within boundaries of lot.
6. Seller will trade for any other lot in the subdivision, except water-front lots, within 1 year from date hereof, at same per-acre price.
7. Ownership of lot carries with it the right to fish on Lake Valeria.
8. Seller will give Purchasers 2 ponies.

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